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September 24, 2018

James Runestad, Chair
Judiciary Committee
Michigan House of Representatives
Via EMAIL: JimRunestad@house.mi.gov

RE: House Bills 5362 and 5398

Dear Chair Runestad:

Tomorrow the House Judiciary Committee is holding a hearing on House Bills 5362 and 5398, sponsored by Representative Peter J. Lucido. While the general goal of these bills – to eliminate the need to provide a third party with a copy of an entire trust instrument when real estate is held subject to a trust – is laudable, the implementation of this goal by these bills will significantly increase the opportunity for identity theft-type problems. These bills are severely flawed.

First, let me introduce myself. I am an attorney in Marquette and have been practicing for nearly 30 years. My primary area of practice involves a significant amount of real estate and trust work. For nearly a decade, I was a member of the State Bar of Michigan's Probate and Estate Planning Section council. I have been honored to have been named in SuperLawyers every year since 2008 and in Best Lawyers in America since 2007. Our law firm, Kendricks, Bordeau, Keefe, Seavoy & Larsen, P.C. is the largest in the Upper Peninsula, and for many years our office owned and operated a title insurance company. I am quite familiar with the issues raised by the two proposed bills, and I have significant concerns with it.

Perhaps the best way to express the concern is to consider the following scenario:

Assume a chain of title ownership in the local register of deeds office for a parcel of real estate shows that a parcel was conveyed from "Thomas Jones" to "Thomas Jones as Trustee of the Thomas Jones Trust" in 2005. Thomas Jones' obituary appears in the local paper in late 2017. In early 2018, Mary Smith engages a real estate agent to help sell the house, which was occupied by Thomas Jones until his death. Mary accepts an offer to sell the house and engages a title insurance company to insure title in the buyer. The buyer's bank similarly engages a title insurance company to insure the bank's mortgage interest.

This is all normal. There is nothing unusual about the form of this transaction.

But who is Mary Smith? Her name doesn't appear in the chain of title. She might be Thomas Jones's daughter, acting as trustee for Mr. Jones's trust, and Smith is her married name. She might be a neighbor, who was a good friend of Mr. Jones, and he asked her to do this favor. But she might also be a complete stranger to the title and to Thomas Jones's family. Or she might be "the black sheep" of the family—the one for whom Thomas Jones explicitly provided in the trust document would not receive anything from his estate.

Who will make sure Mary is really the trustee and has authority to sell the property? Not the real estate agent, the title company or the bank. Under the new proposal, "A person that acts in reliance on a certificate of trust without knowledge that the representations included in the certificate of trust are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the trust and other facts included in the certificate of trust." Given this blanket protection for anyone acting "without inquiry," no rational real estate agent, title company or bank will ask questions.

The buyer similarly has no reason to ask questions. The proposed statute further states that "a person that in good faith enters into a transaction in reliance on a certificate of trust may enforce the transaction against the trust property as if the representation included in the certificate of trust were correct." In other words, if Mary lies (or, less cynically, just doesn't understand this whole trust business) and signs the certificate, the buyer will get the property - free of any claims of the real beneficiaries of Thomas Jones. Therefore, the buyer has no incentive to do anything but accept Mary's signed certificate without inquiry. And the proposed statute insures that, even if Mary's certificate is false or misinformed, the buyer will still get the property.

To make matters worse, the new proposal goes even further to insure the certificate of trust won't be questioned. In Section (8), the proposal states: "A person that makes a demand for the trust instrument in addition to a certificate of trust or excerpts of the trust instrument is liable for damages, costs, expenses, and legal fees if the court determines that the person that made the demand did not act pursuant to a legal requirement to demand the trust instrument" (emphasis added). Picture this: The real estate agent says to Mary, "Are you the trustee? I didn't think Thomas had any daughters. Can I see a copy of the trust?" Mary, having read the law, replies, "There is no legal requirement for you to see the trust. If you ask me about this again, you will be liable for all of my costs and for the damages incurred if this deal doesn't go through." One such experience is likely to prevent any real estate agent, title insurance company or banker from asking questions.

The current statute relating to certificates of trust involving real estate (MCL 565.431 et seq), which was adopted in 1991, requires that a certificate which is not executed by the settlor be executed by "an attorney for the settlor, grantor or trustee; or an officer of a banking institution or an attorney if then acting as a trustee." This requires someone who, at least arguably, understands the terms and effect of the trust ownership and the powers of the trustee. It provides a check and balance in the system to protect everyone involved in the transaction. It assures there will be someone – other than the putative seller – reviewing the terms of the trust agreement, which is very often the last wishes of a decedent.

The proposed statute makes the grieving family, the incapacitated person and the unwary vulnerable to fraud. It protects everyone, who regularly deals with this intersection of real estate

and trust law. Protections would be given to all of those industries and entities with political influence and an understanding of the legislative process—incurious real estate agents, title insurance companies and banks in Section (6) and to buyers in Section (7). The proposed statue would protect everyone who has an incentive to "get the deal done." It eliminates the protections to help make sure the deal gets done right.

The drafters of the 1991 legislation had it right. The statute should not be changed.

Very truly yours,

KENDRICKS, BORDEAU, KEEFE,
SEAVOY & LARSEN, P.C.

Kenneth J. Seavoy

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RE: House Bills 5362 and 5398

Dear Chair Runestad:

I have read the attached letter from Kenneth J. Seavoy regarding House Bills 5362 and 5398 and I am in complete agreement. I have practiced real estate in the Upper Peninsula of Michigan for nearly 50 years and I similarly see the danger of the proposed legislation. I served in the legislature for 6 years on the Judiciary Committee and while I understand how these proposals come forward, this would be disastrous.

Very truly yours,

KENDRICKS, BORDEAU, KEEFE,
SEAVOY & LARSEN, P.C.

Stephen F. Adamini